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In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD WAYNE MUMMERT, PETITIONER

v.

UNITED STATES OF AMERICA

ALFREDO REYNOSO-ULLOA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 548 F.2d 1329.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1977. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on February 21, 1978 (Pet. App. B). The petition for a writ of certiorari in No. 77-1338 was filed on March 22, 1978, and the petition in No. 77-6384 was filed on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to give additional instructions on entrapment.
2. Whether the conduct of a government informant was so shocking that due process principles bar the government from prosecuting petitioners.
3. Whether perjury on the part of a government witness requires reversal of petitioner Mummert's conviction (Pet. 77-1338).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of five counts of distributing

[1] "Pet. App." refers to the Appendix in No. 77-1338.

heroin and one count each of possession of heroin with intent to distribute, use of a telephone to facilitate its distribution, and conspiracy, all in violation of 21 U.S.C. 841, 843, 846, 952, 960 and 963 (Pet. App. A-1). Each petitioner was sentenced to concurrent terms of four years' imprisonment on the charge of use of a telephone to facilitate distribution and to eight years' imprisonment on each of the other counts, to be followed by a three-year term of special parole. The court of appeals affirmed in a lengthy opinion (Pet. App. A-1 to A-20).

In April 1975, Michael Sheen, a government informant who had worked for the Drug Enforcement Administration (DEA) in Seattle, Washington, moved to Southern California following threats on his life (Tr. 71-72). He took a job selling cars at a Ford dealership owned by petitioner Mummert (Tr. 540). Sheen soon became friendly with Mummert and through him met petitioner Reynoso-Ulloa (Reynoso) (Tr. 541-542). As Sheen became better acquainted with Reynoso, he discovered that the latter had an interest in smuggling heroin. Sheen contacted DEA agents Flego and Zweiger, with whom he had worked in Seattle, and asked them if they would be interested in pursuing an investigation (Tr. 73). When the agents indicated their interest, Sheen pursued his negotiations with Reynoso, while maintaining regular contact with the DEA agents (Tr. 73-75, 576).

Sheen told Reynoso that he had connections with a group in Seattle that was seeking a new source of

supply for narcotics (Tr. 572-574). As negotiations developed, Sheen called Agent Flego and told him that Reynoso and Mummert were willing to make a deal if they could be convinced that Sheen's principals in Seattle had the necessary money (Tr. 75, 576-578).

Meanwhile, Sheen was independently negotiating with Mummert, who was trying to obtain $1,200,000 in order to relocate his car dealership. Sheen told Mummert that his father and his father's banking associates had untaxed, illegally earned money available for investments (Tr. 962, 963). Mummert responded that he could "launder" the money and made some preliminary arrangements to do so through Reynoso's connections in Mexico (Tr. 1644-1646). Mummert then met Sheen and the undercover agents in Seattle, where he was shown what appeared to be $1,200,000 (Tr. 79, 587, 1654). Mummert told Agent Flego that either he or Reynoso would be able to launder the money (Tr. 80).

Sheen testified that shortly after their return from Seattle, he met with petitioners Mummert and Reynoso. According to Sheen, this was the first time he had discussed the heroin transaction in Mummert's presence (Tr. 594-595). Sheen explained that the heroin transaction would provide the funds to relocate the dealership (Tr. 986). Sheen testified that Mummert indicated initially that he was reluctant to become involved with the heroin, saying he didn't "really want to be involved with that mess." (*ibid.*). Mummert subsequently agreed to participate with

the expectation that he and Sheen would use the profits from the heroin transaction to invest in Mummert's dealership (Tr. 644, 998-999). Indeed, Mummert later told undercover agent Zweiger that he had convinced Reynoso to sell heroin to Sheen's associates so that he (Mummert) could finance the dealership with his share of the profits (Tr. 1113).

Direct negotiations between the agents and both petitioners continued over several weeks; samples were exchanged, and several meetings took place (Tr. 607, 90-91, 150, 157-161, 184), but problems with Reynoso's Mexican connections caused continuing delays in delivery (Tr. 142, 143, 144, 147). Mummert periodically reassured the agents as to Reynoso's reliability and the quality of the heroin they expected to supply (Tr. 142, 161, 169, 1036, 1044, 1089). Finally, on September 19, 1975, Reynoso and Mummert were ready to deliver one and a half kilograms of heroin for $75,000 (Tr. 183-184). Reynoso was arrested when he delivered the heroin to Agent Flego in Los Angeles, and Mummert was arrested while he was waiting with Agent Zweiger and the purchase money (Tr. 192, 228).

ARGUMENT

1. Petitioners contend that the instructions on entrapment given by the district court were erroneous.

a. Petitioner Mummert contends (Pet. No. 77-1338, pp. 10-11) that the trial court erred in refusing to give one or more of the elaborating instructions

he proposed (Pet. App. D) regarding the relationship between predisposition and economic inducement, since the crux of his defense was that he had been overwhelmed by the promise of large amounts of money offered by informant Sheen.

The entrapment instruction given by the district court (Pet. App. A-16 to A-17) which tracked 1 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 13.09 (3d ed. 1977), properly presented the elements of entrapment established by this Court in *Sorrells* v. *United States*, 287 U.S. 435, and *Sherman* v. *United States*, 356 U.S. 369, and reaffirmed in *United States* v. *Russell*, 411 U.S. 423, and *Hampton* v. *United States*, 425 U.S. 484. The court charged the jury (Pet. App. A-16) that they must acquit if they had a reasonable doubt "whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government * * *." The jury was then instructed that this persuasion or inducement could include the "promise of money or other economic benefit" (*ibid.*).

As the court of appeals correctly found, the additional instructions offered by petitioner Mummert repeated the substance of the court's charge and would have placed undue emphasis on the aspect of inducement, suggesting that the jury could ignore whether petitioner readily accepted the opportunity to break the law (Pet. App. A-17). Accordingly, the

district court did not err in refusing to give the additional instructions.

b. Both petitioners assert a kind of due process defense, based upon the statement in *United States* v. *Russell*, *supra*, 411 U.S. at 431-432, that a situation might some day arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction * * *." Relying on this language as well as statements in the concurring and dissenting opinions in *Hampton* v. *United States*, *supra*, petitioners claim that they were entitled to an instruction directing the jury to acquit them regardless of their criminal predisposition if the jury found the conduct of the government agents "so outrageous as to be fundamentally unfair and shocking to the universal sense of justice." (Pet. App. D-2).

Assuming that such a defense is available in a proper case, however, it would raise a question solely for the court, not the jury. When the focus is on the constitutional limit of governmental involvement in crime, "the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury." *United States* v. *Russell*, 411 U.S. 423, 441 (Stewart, J., dissenting); see *Hampton* v. *United States*, 425 U.S. 484, 497 (Brennan, J., dissenting); *Sherman* v. *United States*, 356 U.S. 369, 385 (Frankfurter, J., concurring in result); *Sorrells* v. *United States*, 287

U.S. 435, 457 (separate opinion of Roberts, J.). Accordingly, the district court did not err in rejecting an instruction on that issue.

2. The court of appeals properly concluded that the facts had not established such a due process defense in the instant case.

a. The court considered and rejected petitioners' claim that profane threats Sheen made to Reynoso were so outrageous as to require reversal of their convictions (Pet. App. A-15 to A-16). As the court correctly noted, "[t]he threat must be viewed in the context of the vulgarity and 'puffing' engaged in by all participants in the transaction" (Pet. App. A-15). During the course of the negotiations, numerous false claims and exaggerated statements were made, all as part of the sordid milieu in which drug trafficking generally takes place. For example, when agents Flego and Zweiger criticized the quality of the heroin that petitioners had supplied, petitioner Mummert himself stated that his supplier would be "wasted" if he ever again delivered inferior heroin (Tr. 1099).

Furthermore, nothing in petitioners' conduct supports their contention that they gave credence to this threat and went ahead with the transaction because of it. To the contrary, Mummert himself testified that on September 5th—the day before Sheen's threat to Reynoso—he was very much interested in having the transaction completed and that he himself had convinced Reynoso to go forward with the deal (Tr. 1739-1740). On the same day, both Reynoso and Mummert urged the agents not to back out of the deal

and assured them that they would locate the heroin through different sources (Tr. 1050-1052).

b. Mummert also suggests (Pet. No. 77-1338, pp. 7, 9-10) that Sheen's offer of a loan of $1.2 million to a businessman known to be in financial distress was such an overwhelming inducement that he could not properly be convicted. This fact, however, suffices neither to make out the due process defense nor to establish entrapment as a matter of law. The court of appeals correctly rejected petitioner's contention, treating the fact that such a large sum was involved as merely one factor to be considered in determining whether Mummert had been entrapped. The court concluded from the evidence that Mummert showed "little, if any, real resistance" to becoming involved in the heroin transaction, that he was at times the moving force in the heroin scheme, that he had agreed to "launder" untaxed money even before he was told of the heroin scheme, that Mummert was unconcerned about illegality and ready to join any enterprise that would bring him a large sum of money (Pet. App. A-10 to A-13). The court concluded (Pet. App. A-13) that the jury could properly reject a defense of entrapment by such a person, "who, motivated by greed and unconcerned about breaking the law, readily accepts a propitious opportunity to commit an offense."

3. Finally, petitioner Mummert contends (Pet. No. 77-1338, pp. 11-12) that a government informant committed perjury during the government's case in chief. "[A] conviction obtained by the *knowing* use

of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (emphasis supplied); see *Napue* v. *Illinois*, 360 U.S. 264, 269.

Although the court below did conclude (Pet. App. A-18) that Sheen's testimony linking Reynoso with one or more drug transactions prior to the incidents involved in this case was false, it also found that there was no evidence that the government knew of this falsity. Petitioner does not challenge this finding. In any event, the record supports the court of appeals' conclusion (*ibid.*) that neither petitioner was prejudiced by the admission of Sheen's statement. To the contrary, as the court of appeals noted, since petitioners knew well in advance of trial what Sheen's testimony would be, they were able to rebut his testimony effectively and thus impeach his credibility. Certainly, the alleged perjury did not prejudice Mummert, since it related only to petitioner Reynoso's alleged prior involvement in drugs and had no bearing on Mummert's participation in the scheme in question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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